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Hearing:
06 AUG 2002

Mailed: 16 AUG 2002
Paper No. 12
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Anton Airfood, Inc.

Serial No. 75/917,312

Laurence E. Stein of Patton Boggs LLP for Anton Airfood,
Inc.

M. Catherine Faint, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Cissel, Walters and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On February 15, 2000, Anton Airfood, Inc. (applicant)
filed an intent-to-use application to register the mark
RAPIDO'S FRESH FOOD FAST (typed drawing) on the Principal
Register for services identified as "restaurant and carry-
out restaurant services" in International Class 42.¹ The
application contains a translation of the word "Rapido" as
the Spanish word for "rapid."

¹ Serial No. 75/917,312.

The examining attorney² ultimately refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because it so resembles the prior registered mark shown below for "restaurant services" in International Class 42 that the examining attorney concluded that it would be likely to cause confusion, or to cause mistake or to deceive.³



The examining attorney also required the applicant to disclaim the phrase "Fresh Food Fast" under the provision of Section 6 of the Trademark Act (15 U.S.C. § 1056).

After the examining attorney made the refusal and the requirement final, this appeal followed, and an oral hearing was held on August 6, 2002.

The examining attorney argues that the services are identical and the commercial impression of the terms WRAPIDO and design and RAPIDO's FRESH FOOD FAST are similar. The term "fresh food fast" is an informational phrase that "is not likely to be used by the consumer when

² The current examining attorney was not the original examining attorney in this case.

calling for the services." Brief at 5. "When the marks are used to call for the services, the consumer could not distinguish between the two sources because they sound exactly the same." Id. In addition, the examining attorney submitted dictionary definitions of the words "fresh," "food," and "fast" to conclude that the "terms would be understood to describe fresh food provided quickly or fast." Brief at 7.

Applicant, on the other hand, submits that the similarity in sound alone is not sufficient to find a likelihood of confusion. Applicant, referring to statements that the registrant made when registrant's mark was pending in the Office, argues that the "WRAPIDO portion of the stylized WRAPIDO with design mark is weak." Brief at 8. Applicant also argues that the design is the dominant portion of the registered mark. Id. It maintains that "applicant's mark is a unitary mark that has no dominant portion." Brief at 5. Applicant submits that "wrapido" is a descriptive term, while its term, "rapido," "indicates a name (e.g., a last name) of a fictitious business owner. In another sense, Applicant's mark indicates a Spanish word for RAPID." Brief at 4-5. Applicant also argues that its mark contains a double

³ Registration No. 2,377,851, issued August 15, 2000.

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entendre, and, therefore, a disclaimer is not appropriate. The double entendre is alleged to lie in the fact that the "word FAST exploits and develops the word RAPIDO, the Spanish word for RAPID." Brief at 8; Reply Brief at 10.

Because we conclude that there would be a likelihood of confusion if the marks WRAPIDO and design and RAPIDO'S FRESH FOOD FAST were both used in connection with restaurant services, we affirm the refusal to register the mark under Section 2(d) of the Trademark Act. We also affirm the examining attorney's requirement for a disclaimer of the phrase FRESH FOOD FAST.

Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has set out the factors that may be considered in determining whether there is a likelihood of confusion. Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000), citing In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factor in our analysis is the relatedness of the services. Here, inasmuch as both applicant and registrant would be providing restaurant services, the services are identical. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (Applicant's restaurant services identified as "restaurant services specializing in Southern-style cuisine" are legally identical to registrant's restaurant services identified as "...restaurant services").

Next, we turn to the similarity of the marks. "If the services are identical, 'the degree of similarity necessary to support a conclusion of likely confusion declines.'" Dixie Restaurants, 41 USPQ2d at 1534, quoting, Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). There is no doubt that there are differences between the cited mark and the applied-for mark, but the question is whether the marks are similar when viewed in their entirety. "[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entirety." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). "The focus must be on the 'general

recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith." Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) (citation omitted). We also understand that human memory of trademarks is not necessarily perfect. See Clorox Company v. State Chemical Mfg. Co., 197 USPQ 840, 844 (TTAB 1977) ("[T]aking into account, as we must, the fallibility of the human memory over a period of time, we conclude that applicant's mark 'FORMULA 999' so resembles opposer's mark 'FORMULA 409' as to be likely" to cause confusion).

Here, when we compare the marks, we find that their similarities far outweigh their differences. First, there is no serious dispute that only word in registrant's mark and the first word in applicant's mark could be pronounced almost identically. While applicant argues that RAPIDO'S may be viewed as the possessive form of a name of a person, it also admits that it is the Spanish word for "rapid" and, indeed, it is very similar to the English word "rapid" with simply the letter "O" added at the end. Both marks would, therefore, likely be pronounced similarly and be understood to have the same meanings of "rapid," "quick," or "fast."

Applicant makes much of the fact that registrant's mark contains a design element. Applicant attaches the

registrant's (then applicant's) response to the examining attorney during the prosecution of the underlying application in which registrant argues that:

By sharp contrast, the dominant portion of Applicant's [now registrant] mark is its design element, which consists of, among other things, highly-stylized lettering that forms "swirls" and a "swirl design." Nothing in the cited mark is remotely similar to Applicant's design. This word, however, may not be considered to have greater weight where it is not given greater weight in both Applicant's and cited applicant's mark.

Response dated January 29, 2001, Ex. A, p. 4.

Registrant's statement hardly indicates that the term "wrapido" is not entitled to be accorded weight in subsequent likelihood of confusion determinations. There is no doubt that there is a significant design element in the registered mark, but it is also clear that the word "wrapido" cannot be ignored in considering the issue of the likelihood of confusion. Indeed, in the same response, registrant clearly denied the descriptiveness of the term. "'WRAPIDO' is a coined word that suggests both the nature of the 'wrap'-style sandwich and the speediness of the restaurant services." Id. at 1. It is interesting to note that both applicant and registrant agree that the term "wrapido" and "rapido" would have the same meaning, "speed," "rapid," or "fast."

Another factor that undercuts applicant's reliance on the design in registrant's mark to distinguish the marks is the fact that applicant has presented its mark in a typed drawing. "[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark in a typed drawing, a difference cannot legally be asserted by that party. Tomy asserts rights in SQUIRT SQUAD regardless of type styles, proportions, or other possible variations. Thus, apart from the background design, the displays must be considered the same." Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). Similarly, here, apart from the background display and swirl, there is no basis to distinguish the cited mark from applicant's mark based on the type style of registrant's mark.

We also have considered the fact that applicant's mark contains the phrase "Fresh Food Fast." While applicant has not disclaimed the term, we do not conclude that this informational phrase would avoid confusion when the terms "Wrapido" and "Rapido" are used with identical services. Descriptive or informational matter is often given less weight when considering the issue of likelihood of confusion. In this case, this is particularly true because the additional wording, when applied to applicant's

identified carry-out restaurant services, would indicate that the fresh food that would be available in the dine-in restaurant would now be available as "fast" or "carry-out" food. Thus, the additional phrase, rather than distinguishing the marks, would reinforce the connection between the marks. See In re McWilliams, 200 USPQ 47, 49 (TTAB 1978) ("While there may be a different connotation between the terms 'EDEN' and 'MT. EDEN' insofar as the word 'EDEN' might be interpreted as referring to the Biblical 'Garden of Eden,' whereas 'MT. EDEN' would refer to a particular mountain, we do not believe that such difference in meaning between the respective terms would have any significant bearing upon the minds of prospective purchasers of wine insofar as the commercial impression created by such terms are concerned").

When we consider the marks in their entirety, we conclude that WRAPIDO and design for restaurant services and RAPIDO'S FRESH FOOD FAST for restaurant and carry-out restaurant services are likely to cause confusion. Dixie Restaurants, 41 USPQ2d at 1534 (THE DELTA CAFÉ and design for restaurant services specializing in Southern-style cuisine confusingly similar to DELTA for hotel, motel, and restaurant services). See also Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA

1977)(CALIFORNIA CONCEPT and design held likely to be confused with CONCEPT for hair care products).

One final point we will address on the likelihood of confusion issue is applicant's contention that the word "wrapido" is descriptive of the goods." Brief at 5. See also Brief at 6 ("the word portion "WRAPIDO," which is at very best descriptive of the registered mark's goods"). The evidence of descriptiveness consists of a Cornell University Internet story announcing that "Cornell students win national food product competition for the third time." The story goes on to report that the "winning entry was a cone-shaped, flour tortilla meal-wrapper called Wrapidos." The other Internet story is a recipe for "Peidmontese 'Wrapido.'" This limited evidence falls far short of establishing that the term is descriptive. It is not even clear from the articles if the term "Wrapidos," which is capitalized and/or in quotes, is used as a descriptive term. Even if it were used descriptively, this limited use would not support a conclusion that the only word in the cited registered trademark is descriptive.

Regarding the examining attorney's requirement to disclaim the phrase "Fresh Food Fast," we agree that it is merely descriptive and that a disclaimer of the term is appropriate.

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A term is merely descriptive if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987); In re Quik-Print Copy Shops, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). A term is descriptive if it describes one of the qualities or properties of the goods. Gyulay, 3 USPQ2d at 1010. While applicant argues that the phrase "fresh food fast" suggests its services and that it "requires imagination, thought or perception to reach a conclusion as to the nature of the services" (Brief at 8; Reply Brief at 10), we are at a loss to understand in what way it does not describe the services set forth in the application. Applicant does not argue that it does not intend to serve "fresh food" nor does applicant argue that it will not attempt to serve the this "fresh food" fast. The examining attorney has included dictionary definitions of "fresh" as "recently made, produced, or harvested; not stale or spoiled: fresh bread;" of "food" as "nourishment taken in solid form: food and drink;" and "fast" as "acting, moving, or capable of acting or moving quickly" and "accomplished in relatively little time." See Office Action dated April 12, 2001, attachments. The phrase "fresh food fast" would

immediately tell potential customers that the applicant's fresh food is prepared quickly.

Applicant does argue that there is a double entendre in the mark that saves the mark from being merely descriptive because the mark is unitary and that no disclaimer is necessary.

A unitary mark has certain observable characteristics. Specifically, its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent parts.

Dena Corp. v. Belvedere International, Inc., 950 F.2d 1555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). Here, the phrase "fresh food fast" has no distinct meaning independent of its constituent parts. The fact that "rapido" and "fast" can have similar meanings does not create any significant double entendre that overcomes the descriptiveness of the phrase. Unlike the term "light" in the mark LIGHT N' LIVELY, "fresh food fast" is not lost in the mark RAPIDO'S FRESH FOOD FAST.

The mark "LIGHT N' LIVELY" as a whole has a suggestive significance which is distinctly different from the merely descriptive significance of the term "LIGHT" per se. That is, the merely descriptive significance of the term "LIGHT" is lost in the mark as a whole. Moreover, the expression as a whole has an alliterative lilting cadence which encourages persons encountering it to perceive it as a whole. For these reasons, we believe that purchasers will not go through the mental process of breaking the mark "LIGHT

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N' LIVELY" into its component elements but will rather regard it as a unitary mark.

In re Kraft, Inc., 218 USPQ 571, 573 (TTAB 1983).

Instead, applicant's term provides information about the restaurant services without creating a unitary mark.

In re Volvo Cars of North America Inc., 46 USPQ2d 1455, 1460 (TTAB 1998) ("We hasten to add that to the extent that applicant's designation DRIVE SAFELY engenders some minor double entendre, this should not result in registration inasmuch as the primary significance of the phrase remains that of a commonplace safety admonition"). Therefore, the requirement for a disclaimer is appropriate.

Decision: The refusal to register the mark under Section 2(d) is affirmed. The requirement for a disclaimer of the phrase "fresh food fast" is also affirmed.